Datuk Oh Chong Peng v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-14–1–04 OF 2022
AHMAD KAMAL J
20 FEBRUARY 2024

Revenue Law — Income tax — Appeal against assessment — Director General of Inland Revenue ('DGIR') imposed tax on appellant pursuant to s 4(b) of the Income Tax Act 1967 ('ITA') instead of s 4(a) of ITA — Special Commissioner of Income Tax dismissed appellant's appeal — Whether DGIR had any basis in law and fact to treat appellant as employee of companies by his appointment as independent director and imposing tax pursuant to s 4(b) of ITA instead of s 4(a) of ITA — Whether DGIR successfully discharged burden of proof required under s 91(3) of ITA in relation to issuance of time-barred assessment — Whether DGIR had any legal or factual basis to impose penalty against appellant under s 113(2) of ITA — Income Tax Act 1967 ss 4(a), (b), 91(1), (3) & 113(2)

The appellant's grievance in the present appeal was pertaining to the decision of the Special Commissioners of Income Tax ('SCIT') in dismissing the appellant's appeal against the assessment raised by the Director General of Inland Revenue ('the respondent'). In summary, the appellant who had received director fees, allowances and consultancy fees ('the said payments') from multiple public listed companies ('the said companies') during the period between 2002 and 2012 had remitted the said payments to two management companies and these payments were treated as the income of the management companies and were subjected to income tax under s 4(a) of the Income Tax Act 1967 ('the ITA'). These management companies then paid the appellant a monthly salary which was also subjected to income tax under the same provision. Pursuant to an audit, the respondent took a stand that the said payments were employment income of the appellant from all the said companies where he sat as an independent non-executive director and subjected them to income tax as employment income under s 4(b) of the ITA. Consequently, the respondent imposed a penalty against the appellant under s 113(2) of the ITA and raised notices of additional assessments against the appellant for the Years of Assessment ('YAs') 2002 to 2012. The appellant's appeal against the notices of additional assessments was dismissed by the SCIT, hence, the present appeal. The issues that arose were: (a) whether the respondent had any basis in law and fact to treat the appellant as an employee of the said companies by his appointment as an independent director and imposing tax pursuant to s 4(b) of the ITA instead of s 4(a) of the ITA; (b) whether the respondent had successfully discharged the burden of proof required under s 91(3) of the ITA in relation to the issuance of the time-barred

assessment for the YAs 2002 to 2009; and (c) whether the respondent had any legal or factual basis to impose a penalty against the appellant for YAs 2002 to 2012 under s 113(2) of the ITA.

Held, allowing the appellant's appeal with costs of RM2,000 subject to the allocator fee:

(1) The legal principles of appellate intervention in cases of a full trial involving oral evidence of witnesses were well-settled. An appellate court would not intervene in a trial court's actual decision unless the trial court had been shown: (a) plainly wrong in arriving at its decision; (b) there was no or insufficient judicial appreciation of the evidence; (c) no reasonable judge, similarly circumstanced, would have decided in the manner that he did; (d) drawing the wrong inference of fact; and (e) to have erred in law or in principle in arriving at a decision in the case. It was trite law that a decision of SCIT could be set aside if the decision was tainted with the error or misconception of law or the decision was not supported by the evidence before the SCIT. In the present case, the court found that the SCIT had failed to scrutinise the evidence presented before it and had misapplied the law and facts which warranted the interference by the court (see paras 7, 11 & 87).

(2) The Federal Court in the case of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 laid down the test when deciding if a contract of service existed. The Federal Court held that the 'degree of control' even though may not be a sole criterion still played an important role when deciding if a contract was one of service or for services. In the present case, the respondent had not established a relationship of master and servant between the appellant and the said companies. The appellant was never an employee and was also never subject to the control of the companies. Further, the court found that the Bursa Malaysia Securities Bhd Practice Note 13 laid down seven requirements of an independent director that led to a clear position that an independent director could not be taken as an employee. Thus, the appellant's director fees, allowances and consultancy fees received should not have been subject to employment tax under s 4(b) of the ITA as a non-executive independent director. Therefore, the SCIT had erred in law and fact when concluding that an independent director was an employee within the meaning of the ITA and for the purposes of taxation (see paras 22–25 & 38–40).

(3) The fact that the appellant received remuneration did not mean he was an employee of the said companies. Unlike an employee, the appellant did not get paid monthly but only upon the approval during the annual general meeting. Further, the company secretary of the said companies had issued various letters to show that the appellant was appointed as an

independent director and not as an employee, but the respondent and the SCIT had disregarded these letters. The court opined that the company secretary was an officer of the company, and the letters issued and signed by the company secretary should be treated as issued and signed by the board of directors. Therefore, the respondent and the SCIT should not have disregarded the letters. The court further found that the SCIT erred in concluding that the EA Form was prima facie evidence that the appellant was an employee. The said form was merely an administrative form prepared by the Inland Revenue Board to obtain necessary information on taxpayers. The form certainly did not supersede the laws enacted by Parliament. Lastly, the court found that case laws from other Commonwealth countries also took the position that an independent director was not an employee (see paras 41, 46–47, 49–50, 53, 56, 58 & 65).

(4) Pursuant to s 91(1) of the ITA, the respondent was only allowed to raise additional assessments within five years after the relevant year of assessment unless one of the exceptions in s 91(3) of the ITA existed, namely whether there was any fraud, or the taxpayer had been negligent. In the present case, the court had found that the appellant as an independent non-executive director was not an employee, and the income received by him could not be treated as employment income. Thus, there was no negligence found in the appellant's declaration of income. More importantly, the respondent had failed to prove negligence against the appellant as the appellant had done diligently what the law expected of a reasonable person in his position. The appellant had taken reasonable steps to file and pay taxes in compliance with the law (see paras 70 & 74–75).

(5) It was not disputed that the respondent had discretionary power to impose a penalty against the appellant under sub-s 113(2) of the ITA after taking into consideration all relevant facts and circumstances of the case. However, after taking into consideration all the relevant facts and circumstances of the case, the court found that the respondent had failed to exercise its discretion on the imposition of a penalty and did not provide reasons for the penalty. On the other hand, the appellant had acted in good faith at all times, sought professional advice from a tax agent, was cooperative during the audit period and submitted his tax returns within the stipulated filing deadline throughout the years and the matter in dispute arose from a technical adjustment. On totality of the facts, the court opined that even if there was an incorrect return or information submitted by the appellant, it was done in good faith. Hence, the imposition of penalty was wrong in law as there was no breach by the appellant (see paras 82–85).

[Bahasa Malaysia summary

Aduan perayu dalam rayuan ini adalah berkaitan dengan keputusan Pesuruhjaya Khas Cukai Pendapatan ('PKCP') menolak rayuan perayu terhadap taksiran yang dibangkitkan oleh Ketua Pengarah Hasil Dalam Negeri ('responden'). Secara ringkasnya, perayu yang telah menerima fi pengarah, elaun dan fi perundingan ('bayaran tersebut') daripada beberapa syarikat tersenarai awam ('syarikat-syarikat tersebut') dalam tempoh antara 2002 dan 2012 telah menyerahkan bayaran tersebut kepada dua syarikat pengurusan dan bayaran ini dianggap sebagai pendapatan syarikat-syarikat pengurusan tersebut dan tertakluk kepada cukai pendapatan di bawah s 4(a) Akta Cukai Pendapatan 1967 ('ACP'). Syarikat-syarikat pengurusan ini kemudiannya membayar perayu gaji bulanan yang turut dikenakan cukai pendapatan di bawah peruntukan yang sama. Berdasarkan satu audit yang dijalankan, responden mengambil pendirian bahawa bayaran tersebut adalah pendapatan penggajian perayu daripada syarikat-syarikat tersebut di mana beliau memegang jawatan sebagai pengarah bebas bukan eksekutif dan tertakluk kepada cukai pendapatan sebagai pendapatan penggajian di bawah s 4(b) ACP. Akibatnya, responden mengenakan penalti terhadap perayu di bawah s 113(2) ACP dan membangkitkan notis taksiran tambahan terhadap perayu bagi Tahun Taksiran ('TT') 2002 hingga 2012. Rayuan perayu terhadap notis taksiran tambahan tersebut telah ditolak oleh PKCP, oleh itu, rayuan semasa. Isu-isu yang timbul ialah: (a) sama ada responden mempunyai asas undang-undang dan fakta untuk menganggap perayu sebagai pekerja syarikat-syarikat tersebut melalui pelantikannya sebagai pengarah bebas dan mengenakan cukai menurut s 4(b) ACP bukannya s 4(a) ACP; (b) sama ada responden telah berjaya melepaskan beban pembuktian yang diperlukan di bawah s 91(3) ACP berhubung dengan pengeluaran taksiran melebihi had masa untuk TT 2002 hingga 2009; dan (c) sama ada responden mempunyai apa-apa asas undang-undang atau fakta untuk mengenakan penalti terhadap perayu bagi TT 2002 hingga 2012 di bawah s 113(2) ACP.

Diputuskan, membenarkan rayuan perayu dengan kos sebanyak RM2,000 tertakluk kepada fi alokator:

(1) Prinsip undang-undang campur tangan rayuan dalam kes perbicaraan penuh yang melibatkan keterangan lisan saksi telah mantap. Mahkamah Rayuan tidak akan campur tangan dalam keputusan sebenar mahkamah perbicaraan melainkan mahkamah perbicaraan telah ditunjukkan: (a) jelas salah dalam membuat keputusan; (b) tiada atau tidak cukup penghayatan kehakiman terhadap keterangan; (c) tiada hakim yang munasabah, dalam keadaan yang serupa, akan membuat keputusan yang sama seperti keputusannya; (d) membuat inferens fakta yang salah; dan (e) telah terkhilaf dari segi undang-undang atau pada prinsip dalam membuat keputusan dalam kes tersebut. Sudah menjadi undang-undang yang mantap bahawa keputusan PKCP boleh

diketepikan jika keputusan tersebut dicemari dengan kekhilafan atau salah tanggapan undang-undang atau keputusan tersebut tidak disokong oleh keterangan di hadapan PKCP. Dalam kes semasa, mahkamah mendapati bahawa PKCP telah gagal untuk meneliti keterangan yang dikemukakan di hadapannya dan telah tersalah menggunakan undang-undang dan fakta yang memerlukan campur tangan oleh mahkamah (lihat perenggan 7, 11 & 87).

(2) Mahkamah Persekutuan dalam kes *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 memperuntukkan ujian yang terpakai apabila memutuskan sama ada kontrak perkhidmatan wujud. Mahkamah Persekutuan berpendapat bahawa 'degree of control', walaupun ia mungkin bukan satu-satunya kriteria, ia masih memainkan peranan penting apabila memutuskan sama ada sesuatu kontrak itu adalah kontrak perkhidmatan atau kontrak untuk perkhidmatan. Dalam kes ini, responden tidak membuktikan hubungan majikan dan pekerja antara perayu dan syarikat-syarikat tersebut. Perayu tidak pernah menjadi pekerja dan juga tidak pernah tertakluk kepada kawalan syarikat-syarikat tersebut. Selanjutnya, mahkamah mendapati Nota Amalan 13 Bursa Malaysia Securities Bhd menetapkan tujuh keperluan pengarah bebas yang membawa kepada kedudukan yang jelas bahawa pengarah bebas tidak boleh dianggap sebagai pekerja. Oleh itu, fi pengarah, elaun dan fi perundingan yang diterima perayu tidak sepatutnya tertakluk kepada cukai penggajian di bawah s 4(b) ACP sebagai pengarah bebas bukan eksekutif. Oleh itu, PKCP telah terkhilaf dari segi undang-undang dan fakta apabila membuat kesimpulan bahawa pengarah bebas adalah pekerja mengikut pengertian ACP dan untuk tujuan percukaian (lihat perenggan 22–25 & 38–40).

(3) Hakikat bahawa perayu menerima imbuhan tidak bermakna dia adalah pekerja syarikat-syarikat tersebut. Berbeza dengan pekerja, perayu tidak mendapat gaji bulanan tetapi hanya dibayar selepas mendapat kelulusan semasa mesyuarat agung tahunan. Selanjutnya, setiausaha syarikat bagi syarikat-syarikat tersebut telah mengeluarkan pelbagai surat untuk menunjukkan bahawa perayu dilantik sebagai pengarah bebas dan bukan sebagai pekerja, tetapi responden dan PKCP telah mengabaikan surat-surat ini. Mahkamah berpendapat bahawa setiausaha syarikat adalah pegawai syarikat, dan surat-surat yang dikeluarkan dan ditandatangani oleh setiausaha syarikat harus dianggap sebagai dikeluarkan dan ditandatangani oleh lembaga pengarah. Oleh itu, responden dan PKCP tidak sepatutnya mengabaikan surat-surat tersebut. Mahkamah selanjutnya mendapati PKCP terkhilaf dalam membuat kesimpulan bahawa Borang EA adalah keterangan prima facie bahawa perayu adalah seorang pekerja. Borang tersebut hanyalah borang pentadbiran yang disediakan oleh Lembaga Hasil Dalam Negeri

untuk mendapatkan maklumat yang diperlukan mengenai pembayar cukai. Borang tersebut pastinya tidak menggantikan undang-undang yang digubal oleh Parlimen. Akhir sekali, mahkamah mendapati bahawa undang-undang kes dari negara Komanwel yang lain juga mengambil pendirian bahawa seorang pengarah bebas bukan seorang pekerja (lihat perenggan 41, 46–47, 49–50, 53, 56, 58 & 65).

(4) Menurut s 91(1) ACP, responden hanya dibenarkan untuk membangkitkan taksiran tambahan dalam tempoh lima tahun selepas tahun taksiran yang berkaitan melainkan satu daripada pengecualian dalam s 91(3) ACP wujud, iaitu sama ada terdapat fraud, atau pembayar cukai telah berlaku cuai. Dalam kes ini, mahkamah telah mendapati bahawa perayu sebagai pengarah bebas bukan eksekutif bukanlah seorang pekerja, dan pendapatan yang diterima olehnya tidak boleh dianggap sebagai pendapatan penggajian. Oleh itu, tiada kecuaian didapati dalam pengisytiharan pendapatan perayu. Lebih penting lagi, responden telah gagal membuktikan kecuaian terhadap perayu kerana perayu telah melakukan dengan tekun apa yang diharapkan oleh undang-undang daripada orang yang munasabah dalam kedudukannya. Perayu telah mengambil langkah-langkah yang munasabah untuk memfailkan dan membayar cukai mengikut undang-undang (lihat perenggan 70 & 74–75).

(5) Tidak dipertikaikan bahawa responden mempunyai kuasa budi bicara untuk mengenakan penalti terhadap perayu di bawah sub-s 113(2) ACP selepas mengambil kira semua fakta dan keadaan kes yang berkaitan. Bagaimanapun, selepas mengambil kira semua fakta dan keadaan kes yang berkaitan, mahkamah mendapati bahawa responden telah gagal melaksanakan budi bicaranya mengenai pengenaan penalti dan tidak memberikan sebab bagi penalti tersebut. Sebaliknya, perayu telah bertindak dengan suci hati pada setiap masa, mendapatkan nasihat profesional daripada ejen cukai, bekerjasama semasa tempoh audit dan mengemukakan penyata cukainya dalam tempoh tarikh akhir pemfailan yang ditetapkan sepanjang tahun dan perkara yang dipertikaikan tersebut timbul daripada pelarasan teknikal. Berdasarkan keseluruhan fakta, mahkamah berpendapat jika pun terdapat penyata atau maklumat yang salah yang dikemukakan oleh perayu, ia dilakukan dengan suci hati. Oleh itu, pengenaan penalti tersebut adalah salah di sisi undang-undang kerana tiada perlanggaran yang dilakukan oleh perayu (lihat perenggan 82–85).]

Cases referred to

A & Anor v C & Anor [2015] SASC 35, SC (refd)
Ace Insurance Ltd v Trifunovski [2014] 2 ILJ 399, FC (refd)
Chong Kim Sang v Metatrade Sdn Bhd [2004] 3 MLJ 1; [2004] 1 MLRA 241; [2004] 1 MELR 4; [2004] 2 CLJ 439, CA (refd)

Delta-Pelita Sebakong Sdn Bhd v Wong Hou Lianq & Ors and other appeals [2020] 3 MLJ 415; [2020] 3 MLRA 434, CA (refd)
Director-General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd [1990] 2 MLJ 415; [1990] 1 MLRA 373; [1990] 2 CLJ 160, SC (refd)
Ever-Yield Sdn Bhd v Yap Keat Choon and other appeals [2023] 2 MLJ 90; [2022] MLRAU 189; [2023] 1 CLJ 345, CA (refd)
Gan Yook Chin (P) Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 2 MLRA 1; [2004] 4 CLJ 309; [2004] 6 AMR 781, FC (refd)
He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal [2020] 4 MLJ 662; [2020] 5 MLRA 98; [2020] 7 CLJ 271; [2020] 5 AMR 645, FC (refd)
Hoh Kiang Ngan v Mahkamah Perusahaan & Anor [1995] 3 MLJ 369; [1995] 2 MLRA 435; [1995] 1 MELR 1; [1996] 4 CLJ 687; [1996] 3 AMR 3693, FC (refd)
Infra Quest Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2016] MSTC 30–133, CA (refd)
Kalyani Forge Ltd Pune v Assessee (Appeal Nos 1133/P/2013 and 1925/PN/2013) (unreported) (refd)
Kenny Heights Developments Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2015] 4 MLJ 487; [2015] 5 CLJ 923; [2015] 4 MLRA 114; [2015] 3 AMR 205, CA (refd)
Lim Chao Liang & Lim Chao Li v Ketua Pengarah Hasil Dalam Negeri (Appeal No PKCP(P) 90 of 2012) (unreported) (refd)
Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 1 MLRA262; [1994] 3 CLJ 541; [1994] 2 AMR 1735, SC (refd)
Sime Darby Bhd & Ors v Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties [2012] 9 MLJ 464; [2012] 2 MLRH 466, HC (refd)
Tan Ban Uu & Anor v Ong Ghin Leong [2017] MLJU 244; [2017] 1 MLRHU 115; [2017] 3 AMR 287, HC (refd)
The Queen on the Prosecution of JB Saunders v The Postmaster General (1876) 1 QBD 658 (distd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016)
Companies Act 2016 s 216
Employee Provident Fund Act 1991 s 43(1)
Employment Act 1955
Income Tax Act 1967 ss 2, 4(a), (b), 91(1), (3), 113(1), (2)
Industrial Relations Act 1967

S Saravana Kumar (with Amira Mohd Rafie Ravi) (Rosli Dahlan Saravana Partnership) for the appellant.

Abdul Aziz bin Harun (Senior Revenue Counsel, Inland Revenue Board of Malaysia) for the respondent.

Ahmad Kamal J:

INTRODUCTION

[1] This is an appeal by Datuk Oh Chong Peng ('appellant') by way of a notice of appeal dated 6 April 2022 (encl 1) against the decision of the Special Commissioners of Income Tax ('SCIT').

[2] By the deciding order dated 31 March 2022, the SCIT disallowed the appeal by way of Form Q by the appellant against the assessment raised by the respondent.

[3] The SCIT in the deciding order dated 31 March 2022 had made the following findings:

> ADALAH DIPUTUSKAN bahawa Perayu telah gagal membuktikan rayuan Perayu selaras dengan perenggan 13 Jadual 5 Akta Cukai Pendapatan 1967;
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> DAN bahawa Perayu adalah seorang 'pekerja' bagi maksud di bawah ACP;
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> DAN bahawa saraan yang diterima oleh Perayu sebagai Pengarah Bebas/*Independent Director* daripada syarikat-syarikat di mana beliau menduduki Lembaga Pengarah bagi Tahun-Tahun Taksiran 2002 sehingga 2012 adalah pendapatan Perayu dan dikenakan cukai di bawah subseksyen 4(b) ACP;
>
> DAN bahawa Perayu telah cuai apabila gagal melaporkan saraan yang diterima dari yuran dan elaun pengarah di syarikat-syarikat yang beliau duduki sebagai Lembaga Pengarah dan juga fi konsultansi sebagai pendapatannya di bawah subseksyen 4(b) ACP sebaliknya memindahkan saraan yang diterima kepada dua syarikat pengurusannya iaitu, OCP Holding Sdn Bhd dan Garzania Sdn Bhd dan melaporkan sebagai pendapatan syarikat pengurusan di bawah subseksyen 4(b) ACP;
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> DAN bahawa Responden telah berjaya melepaskan beban bukti di bawah subseksyen 91(3) ACP berkaitan taksiran di luar had masa yang dibangkitkan terhadap Perayu bagi Tahun-tahun Taksiran 2002 sehingga 2009;
>
> DAN bahawa Responden adalah betul dalam mengenakan penalti terhadap Perayu bagi Tahun-tahun Taksiran 2002 sehingga 2012 di bawah subseksyen 113(2) ACP
>
> DAN DENGAN ITU rayuan Perayu ditolak dan Notis Taksiran Tambahan bagi tahun-tahun taksiran 2002 sehingga 2012 yang berkaitan rayuan ini adalah dikekalkan.

(See: pp 50–52 of *rekod rayuan tambahan* ('RRT').)

[4] The appellant being aggrieved with the decision of the SCIT filed an appeal and is now before this honourable court for the court's opinion on whether the decision by the SCIT was correct based on the facts and law.

[5] After the hearing, I allowed the appellant's appeal in encl 1. I now give my reasons for doing so.

BACKGROUND FACTS

[6] The narration of the background facts herein is adopted with and/or without modification from the established facts found by the SCIT and can be summarised as follows:

(a) the appellant is an individual with a residential address at 5, Laman Setiakasih Lapan, Off Jalan Setiakasih Lapan, Bukit Damansara 50490 Kuala Lumpur, Malaysia;

(b) two management companies were incorporated by the appellant namely OCP Holding Sdn Bhd (Company No 131139-T) and Garzania Sdn Bhd (Company No 100795-T) ('the management companies'). Both the management companies have an office address at Suit 705, Block A, Kelana Business Centre, 97, Jalan SS7/2, 47301 Petaling Jaya, Malaysia;

(c) after the appellant retired from his professional practice, the appellant continued to sit on the Board of Directors as an independent non-executive director of several public companies. He received director's fees and allowances from these companies. These companies, among others, include IJM Corporation Bhd, IJM Plantations Bhd and Dialog Group Bhd. During the Years of Assessment ('YAs') 2002–2012, the appellant, sometimes, sat on the Board of Directors of seven or eight unrelated companies at the same time. The appellant also from time to time provided consultancy services to companies where he does not sit on the Board of Directors. He received consultancy fees from these companies for his services;

(d) all the director fees, allowances and consultancy fees received from December 1997 to date were remitted to the management companies. These were treated as the income of the management companies and were subjected to income tax under s 4(a) of the Income Tax Act 1967 ('the ITA');

(e) the management companies then pays a monthly salary to the appellant, which he further subjects to income tax in his personal capacity as business income under s 4(a) of the ITA. This has been adopted consistently by the appellant since 1998 and it has been accepted by the respondent until 2015;

(f) consequent to an audit, the respondent had taken the stance that the

director fees, allowance and consultancy fees were employment income of the appellant from all the companies where he sat as an independent non-executive director and subjected them to income tax as employment income under s 4(b) of the ITA;

(g) the respondent raised notices of additional assessments against the appellant for the YAs 2002 to 2012 as follows:

Year of assessment	Date of digital assessment	Additional tax payable (RM)
2002	11 January 2016	15,428
2003	11 January 2016	63,335.99
2004	11 January 2016	52,069.50
2005	11 January 2016	46,248
2006	11 January 2016	35,322
2007	11 January 2016	45,032
2008	3 February 2016	924
2009	3 February 2016	567
2010	3 February 2016	546
2011	3 February 2016	546
2012	12 January 2016	138,355.23

(h) on 5 February 2016, the appellant, being aggrieved by the impugned notices of additional assessment filed notices of appeal (ie Form Q) dated 5 February 2016 for YAs 2002–2012 as follows:

Year of assessment	Date of notice of additional assessment
JA 2002	11 January 2016
JA 2003	11 January 2016
JA 2004	11 January 2016
JA 2005	11 January 2016
JA 2006	11 January 2016
JA 2007	11 January 2016
JA 2008	3 February 2016
JA 2009	3 February 2016
JA 2010	3 February 2016
JA 2011	3 February 2016
JA 2012	12 January 2016

THE LAW

[7] It is trite law that a decision of SCIT can be set aside if the decision is tainted with the error or misconception of law or the decision is not supported by the evidence before the SCIT.

[8] This principle of law has been succinctly explained in the case of *Lower*

Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 1 MLRA262; [1994] 3 CLJ 541; [1994] 2 AMR 1735 in the following manner:

> First of all, it would be pertinent to say that in consideration of this appeal we have kept in the forefront of our minds the much-quoted principles enunciated by Lord Radcliffe in *Edwards v Bairstow and Harrison*, regarding *the duty of the court when hearing appeals from commissioners in tax cases*. It will be recalled that in that case what Lord Radcliffe said (at pp 35–36) was this:
>
> > I think that the true position of the court on ail these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination, I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. *When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous on point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene*. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as those many of the facts are likely to be neutral in themselves, and only to take their color from the combination of circumstances in which they are found to occur.

In *Chua Lip Kong v Director-General of Inland Revenue*, Lord Diplock when delivering the unanimous judgment of the Privy Council in a tax appeal had occasion to refer, with approval, to the observations of Lord Radcliffe aforesaid in the following terms:

> ... It is *plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable special commissioners could have reached if they had correctly directed themselves in law*. Whichever way it is looked at, it falls within the well-known principles laid down by Viscount Radcliffe in Edwards v Bairstow. *It is a conclusion or decision of the special commissioners which the High Court was entitled to the ought to have set aside*.

And, in *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue*, when delivering the unanimous judgment of the Privy Council, Lord Oliver indicated in

what circumstances a court might interfere with the decision of the special commissioners. Here is what His Lordship said (at p 169):

> The special commissioners are, of course, as the Federal court rightly observed, the judges of fact, but in finding the facts and drawing interferences of secondary fact from them, they must not misdirect themselves and they *must draw conclusions from facts having probative value. In their Lordships' judgment, the special commissioners in this case both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were of no probative value in supporting their conclusions.* (Emphasis added.)

[9] Further the then Supreme Court in the case of *Director-General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd* [1990] 2 MLJ 415 at p 419; [1990] 1 MLRA 373; [1990] 2 CLJ 160 held as follows:

> *It is hardly necessary for any lawyer to be reminded that under our Income Tax Act 1967 (paras 34, 39, 41 and 42 of Schedule 5 of the Income Tax Act 1967) one may only appeal to the High Court and then to the Supreme Court on a question of law. The decision of the Special Commissioners of Income Tax as to the facts is therefore, conclusive*. In this connection, it is interesting to note the following statement by Lord Denning on the powers of the High Court on appeal in *Griffiths v JP Harrison (Watford) Ltd* at p 916.
>
> > Now the powers of the High Court on an appeal are very limited. *The judge cannot reverse the commissioners on their findings of fact. He can only reverse their decision if it is erroneous in point of law*.
> >
> > Now here the primary facts were all found by the commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusion from them. It is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by them. *It is not sufficient that the judge would himself have come to different conclusion*. Reasonable people on the same facts may reasonably come to different conclusions; and often do. Juries do. So, do judges. And are they not all reasonable men? *But there comes a point when a judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, he is entitled to interfere*.
>
> *A court would not therefore disturb findings of fact by the Special Commissioners unless it considers that the only reasonable conclusion on the evidence contradicts the determination of the Special Commissioners* (see *Edwards v Bairstow*, *Director-General of Inland Revenue v LCW* at p 251 and *Kota Kinabalu Industries Sdn Bhd v Director-General of Inland Revenue* at p 190). (Emphasis added.)

[10] The court also has to be remindful of the caution made by the Court of Appeal in *Kenny Heights Developments Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2015] 4 MLJ 487; [2015] 5 CLJ 923; [2015] 4 MLRA 114; [2015] 3 AMR 205 where it had stated as follows:

> [24] We make the general observation that courts, acting in accordance with the

law, are at all times bound by the legislation placing jurisdiction and authority in specialised bodies such as SCIT. *The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not on any grievance. It underlines, within the SCIT's jurisdiction, its authority and prevents the courts being buried under an avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT.*

[25] Courts must also bear in mind the SCIT's specialisation. Dealing with terms and practices of the business and the business community enable them to have special insight, understanding and appreciation of the evidence and facts, to make the findings drawn from those evidence and facts. While a finding of fact often touches upon the law, the determining factor in the finding is their special insight and appreciation of the facts. *Hence, unless it is demonstrated that SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court cannot intervene, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT* (see *Lower Perak Cooperative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 541; [1994] 2 AMR 1735; [1994] 1 MLRA 262). (Emphasis added.)

[11] The legal principles of appellate intervention in cases of a full trial involving oral evidence of witnesses are well-settled. It is trite law that an appellate court will not intervene in a trial court's actual decision unless the trial court has been shown:

(a) plainly wrong in arriving at its decision;

(b) there is no or insufficient judicial appreciation of the evidence;

(c) no reasonable judge, similarly circumstanced, would have decided in the manner that he did;

(d) drawing the wrong inference of fact; and

(e) to have erred in law or in principle in arriving at a decision in the case.

See:

(i) *Gan Yook Chin (P) Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 2 MLRA 1; [2004] 4 CLJ 309; [2004] 6 AMR 781;

(ii) *Delta-Pelita Sebakong Sdn Bhd v Wong Hou Lianq & Ors and other appeals* [2020] 3 MLJ 415; [2020] 3 MLRA 434; and

(iii) *He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal* [2020] 4 MLJ 662; [2020] 5 MLRA 98; [2020] 7 CLJ 271; [2020] 5 AMR 645.

THE ISSUES

[12] The issues for determination before the SCIT were as follows:

(a) whether the respondent has any basis in law and fact to treat the appellant as an employee of various public listed companies by his appointment as an independent director and imposing tax pursuant to s 4(b) of the ITA instead of s 4(a) of the ITA;

(b) whether the respondent has successfully discharged the burden of proof required under s 91(3) of the ITA in relation to the issuance of the time-barred assessment for the YAs 2002–2009; and

(c) whether the respondent has any legal or factual basis to impose a penalty against the appellant for YAs 2002 to 2012 under s 113(2) of the ITA.

THE PARTIES CONTENTION

[13] The appellant is contesting the respondent's stand to treat the director fees, allowances and consultancy fees received as employment income of the appellant.

[14] In brief, the appellant's position is that directors' fees, allowances and consultancy fees from companies where the appellant sat as an independent non-executive director should not be subjected to income tax as employment income under s 4(b) of the ITA. This is primarily because the appellant was not an employee of the company.

[15] The appellant submits that the learned SCIT had erred in its decision:

(a) failing to consider that an independent director is not an employee;

(b) failing to consider that the appellant's directors fees etc are not employment income taxable under s 4(b) of the ITA

(c) failing to consider the documentary evidence and testimonies by the appellant's witness;

(d) failing to consider the objective of the issuance of EA forms;

(e) concluding that the respondent has successfully discharged the burden of proof under s 91(3) of the ITA in relation to the issuance of the time-barred assessment for YAs 2002 to 2009; and

(f) concluding that the penalty imposed under s 113(1) of the ITA upon the appellant is correct in law.

[16] The respondent's contention may be summarised as follows:

(a) the payments received by the appellant as director from the companies in which he had sat on the Board of Directors for the YA 2002 to 2012 should be treated as employment income of the appellant and be subjected to tax under s 4(b) of the ITA;

(b) the appellant had acted negligently and filed incorrect tax returns for the YAs 2002 to YA 2009, therefore failing within the ambit of the exception in s 91(3) of the ITA; and

(c) the penalty of 45% was correctly imposed on the appellant.

THE DECISION OF THE COURT

Whether an independent directors are employees

[17] During the relevant years of assessment, the appellant sat as an independent director of the following companies:

(a) Alliance Financial Group Bhd;

(b) AmFinance Bhd;

(c) AmBank Bhd;

(d) AMFB Holdings Bhd;

(e) British American Tobacco (M) Bhd;

(f) Dialog Group Bhd;

(g) UM Corp Bhd;

(h) UM Plantations Bhd;

(i) Kumpulan Europlus Bhd;

(j) Land & General Bhd;

(k) Malayan Flour Mills Bhd;

(l) Malaysian Plantations Bhd;

(m) Nanyang Press Holdings Bhd;

(n) RHB Bank Bhd;

(o) Rohas-Euco Industries Bhd;

(p) Star Media Group Bhd; and

(q) UEM Land Bhd.

[18] The learned SCIT was of the view that the appellant fell within the category of employment whereby the term 'employment' is not limited to only instances where there exists a master servant relationship.

(See: paras 41–43 of the SCIT's grounds of decision on pp 78–79 additional record of appeal (encl 18).)

[19] The definition of 'employee' and 'employment' is provided under s 2 of the ITA. However, I find that the SCIT had taken a broad interpretation of the words 'employee' and 'employment' to include a person who was appointed an independent director of a company.

[20] I find that the SCIT had failed to distinguish an independent director from a director within a company. This distinction was explained in the Court of Appeal case of *Chong Kim Sang v Metatrade Sdn Bhd* [2004] 3 MLJ 1; [2004] 1 MLRA 241; [2004] 1 MELR 4; [2004] 2 CLJ 439 where it was held:

> [29] The relationship of employer and employee exists where a worker is employed under a contract of employment, ie a contract of service. According to the *Concise Oxford Dictionary* (9th Ed), an 'employee' is 'a person employed for wages or salary'. *A person who is appointed director of a company does not become an employee of the company. Whether he is entitled to receive remuneration as director would depend on the articles of association and that would normally have to be determined by the company in general meeting. An employee of a company can of course be appointed director of that company. He remains an employee of the company as long as his contract of employment has not been terminated and would still be entitled to receive wages or salary*. As director, he would further be entitled to any remuneration as determined by the company in general meeting if that is what is provided for and allowed by the articles of association of that company. Section 30(1) of the Companies Act 1965 provides that articles (of association) may adopt all or any of the regulations contained in Table A of the Fourth Schedule to the Companies Act. Article 70 as contained in the said Table A reads:
>
> > The remuneration of the directors shall from time to time be determined by the company in general meeting. That remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.
>
> [30] We did not have the benefit of sighting a copy of the articles of association of the respondent in relation to remuneration of directors and thus would not be in a position to say whether the respondent adopted such an article in its articles of association. Be that as it may, *we noted that the minutes of the respondent's board of directors meeting held on 15 March 1993 showed that the board recommended varying amounts of director's fee be paid to the respondent's directors which included the appellant, subject to the approval of the shareholders at the forthcoming annual general meeting of the respondent*. It was recommended that RM500 be paid to the appellant as director's fee for that financial year ended 31 December 1992. *Directors' fees are not wages or salaries and generally shall be determined by the company in general meeting*. (Emphasis added.)

[21] The second category of employment which was referred to by the learned SCIT refers to a contract of service by an independent contractor for which a salary or remuneration is paid in exchange.

[22] The Federal Court in the case of *Hoh Kiang Ngan v Mahkamah Perusahaan & Anor* [1995] 3 MLJ 369; [1995] 2 MLRA 435; [1995] 1 MELR 1; [1996] 4 CLJ 687; [1996] 3 AMR 3693 laid down the test when deciding if a contract of service exists. The Federal Court held that the 'degree of control' even though may not be a sole criterion still plays an important role when deciding if a contract is one of service or for services. For instance, the RW verified that as an employee, he was given an employment circular, which refrained him from having the freedom of choosing his work attire, hairstyle and shoes, which on the other hand, the RW did not find such circular given to the appellant.

(See: notes of proceedings (encl 42) on pp 30–34.)

[23] Therefore, I find that there was no relationship of master and servant between the appellant and the public listed companies has been established in the instant case.

[24] I find that the appellant was never an employee and was also never subject to the control of the companies. Thus, the director's fees received by the appellant should be taxed as business income and not employment income.

[25] Further, I find that the Bursa Malaysia Securities Bhd Practice Note 13 sets out seven requirements of an independent director that led to a clear position that an independent director cannot be taken as an employee. Paragraph 1.01 of the Listing Requirement defines an 'independent director':

> 'independant director' means a director who is independent of management and free from any business or other relationship which could interfere with the exercise of independent judgement or ability to act in the best interests of an applicant or a listed issuer.

[26] However, the SCIT at para 57 of the SCIT's ground of decision had erred in concluding that the definition of independent director set by Bursa Malaysia was mere guideline and only persuasive.

[27] According to Bursa's Participating Organisations' Directives and Guidance, the directives and guidance that impose an obligation on a participating organisation or registered person are binding on the participating organisation or registered person. The positions for all listed companies are the same whereby an individual who is an independent director is not an employee.

[28] In coming to its decision, I find that the SCIT failed to take into consideration various case laws on the same issue which had decided in favor of the tax payer.

[29] In the case of *Lim Chao Liang & Lim Chao Li v Ketua Pengarah Hasil Dalam Negeri* (Appeal No PKCP(P) 90 of 2012) (unreported) the learned SCIT had decided in favor of the taxpayer. The subsequent appeal by the respondent to the High Court was also eventually withdrawn. In this case, the SCIT clearly held that a director is not an employee, which the respondent had ignored that this decision shall be a binding decision against the respondent.

[30] It is to be noted that the absence of a master-servant relationship is one of many factors raised by the appellant as to the reason why the appellant is not an employee.

[31] In *Lim Chao Liang & Lim Chao Li* the SCIT held that there was no element supporting that there was a master-servant relationship and considered the following factors:

(a) there was no contract of employment;

(b) there were no offers of employment to carry out responsibilities and duties as a director;

(c) there were no EPF and PERKESO accounts opened;

(d) there were no pension benefits;

(e) there was no ID card as an indication of an employee;

(f) there was no requirement of wearing a uniform;

(g) the director had the liberty and discretion to decide the amount and regularity of time to devote to exercising his duties as a director;

(h) there was no fixed office;

(i) there was no entitlement to any recourse in the Industrial Court under the Employment Act 1955 or Industrial Relations Act 1967 if removed as a director;

(j) the general resolutions used by respondent cannot be deemed guidelines and cannot be used to determine if a person is an employee; and

(k) at all material times, there is no master and servant relationship subsisting between the companies and the appellant.

[32] In the present case, the facts are the same as *Lim Chao Liang & Lim Chao Li* whereby the RW testified during the cross-examination that he had not seen any offer of employment, increment letter, circular on employment, employee handbook, given from the companies to the appellant. It is clear that the appellant in this case does not fall within either of the categories of an 'employee' under the ITA.

[33] One of the factors to be considered in determining if a person is an employee is the employee's contribution to the Employee Provident Fund ('EPF') and PERKESO. Section 43(1) of the Employee Provident Fund Act 1991 ('the EPF Act 1991') made it clear that employers cannot be exempted from contributing EPF and PERKESO to their employees:

> ... every employee and every employer of a person who is an employee within the meaning of this Act shall be liable to pay monthly contributions on the amount of wages of the month

[34] It is interesting to note that RW during the cross examination conceded that they obtained no evidence showing that the appellant had received the common employees' benefit such as EPF or PERKESO from the companies in which the appellant sat as an independent director. On the other hand, evidence produced by the appellant shows that the appellant received employees benefit from the two management companies.

[35] Further, evidence shows that the appellant as an independent director does not receive his director's fees monthly. His fees will only be paid upon approval during the annual general meeting of a company and the approved fees will be segregated among the board of independent non-executive directors.

(See: Vol 2G of the record of appeal (encl 12) on pp 104–259 for various extracts of the listed companies' annual report and EGM minutes.)

[36] On the other hand, an employee's salary is usually paid on a daily, weekly or monthly basis. Most importantly, the salary of an employee will be known prior to the employment, and in the event that an employee is not paid after providing their service, the employee could seek a remedy through Industrial Court.

[37] Furthermore, in *Sime Darby Bhd & Ors v Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties* [2012] 9 MLJ 464; [2012] 2 MLRH 466, Lee Swee Seng JC (now JCA) held that a non-executive director is not an employee when he said as follows:

> [68] *One cannot deny that the duties of non-executive directors are different from that of executive directors*. What is expected of and exacted from them as non-executive directors are different from that of executive directors. Whilst they all owe a common duty to the company to act in good faith in the best interest of the company at all times (s 132(1) of the Companies Act 1965), yet with respect to the execution of the matters that the Board and Committee members have discussed, deliberated and decided, it is the executive directors that would execute the decisions made. In other words, the executive directors will have to descend to the base and execute the decisions, solve problems, manage resources, monitor progress, measure performance and be answerable to the Board and Committee for the

performance of the company as a whole. The executive directors being fulltime employees of the company as most of them generally are, would be the hands-on people involved in the daily grind of negotiation, supervision and operations. The executive directors would be answerable to the Board and Committee as a whole for the quarterly performance of the company as the non-executive directors meet with the executive directors in the full board meetings to review quarterly results before these are released to investors through Bursa Malaysia. Little wonder that the full board is required to meet at least four times in a year. *The duties of the non-executive director vis a vis the company are performed on an intermittent basis as he meets with the other non-executive directors and executive directors at the quarterly meeting of the Board or more often as may be necessary. Whilst they receive director's fees for being non-executive directors, they do not draw a salary unlike executive directors who are expected to work in a normal 9–5 job*.

[69] *Non-executive directors are not full-time employee of the company and they may not be trained or experienced in the particular business of the company. They are allowed to be directors of other companies whether listed or non-listed subject to the number set by the bursa securities listing requirement. It stands to reason and indeed the reality of the matter is that vis-a-vis the company, the non-executive directors' duties cannot be as co-extensive as that of executive directors. Both common sense and commercial structures draw a distinction that modem business cannot ignore*. (Emphasis added.)

[38] It is clear from the above case laws that an independent nonexecutive director is not an employee. This is evident from the fact that there is no master-servant relationship between the appellant and the various listed companies on whose board he sat as an independent director.

[39] The appellant's director fees, allowances and consultancy fees received should not have been subject to employment tax under s 4(b) of the ITA as a non-executive independent director.

[40] Therefore, I am of the view that the SCIT erred in law and fact when concluding that an independent director is an employee within the meaning of the ITA and for the purposes of taxation.

Director's remuneration

[41] It is this court's view that the fact that the appellant received remuneration for the services he provided, does not mean he is an employee of all the companies in which he sat as an independent director.

[42] On this issue, the SCIT relied on the following case and extract in arriving at the conclusion:

[52] Panel bersetuju di dalam *The Queen on the Prosecution of JB Saunders v The Postmaster General* (1876) 1 QBD 658 per Blackburn:

... The word 'remuneration' is a wider term and means a quid pro quo. If a man

gives his services, whatever consideration he gets for giving his services seem to me a remuneration for them. Consequently, I think if a person was in the receipt of a payment which would not be actual money payment, the amount he would receive annually in respect of this would be 'remuneration'.

(See: the additional record of appeal (encl 18) on p 86 (para 52 of the SCIT's grounds of decision).)

[43] However, I find that the SCIT had failed to consider that the abovementioned case pertains of the word 'emolument' and has nothing to do with directors' fee or a similar type of payout. The case does not address the issue in our present case.

[44] Rather than referring to *The Queen on the Prosecution of JB Saunders*, the SCIT should have referred to the Court of Appeal case of *Ever-Yield Sdn Bhd v Yap Keat Choon and other appeals* [2023] 2 MLJ 90; [2022] MLRAU 189; [2023] 1 CLJ 345, which directly deals with the issue at hand where it was held:

Director's remuneration

[36] In *Wong See Yaw & Anor v Bright Packaging Industry Bhd* [2016] MLJU 1911; [2016] MLRHU 296; [2016] 6 CLJ 465 the High Court usefully in the following passages summarised the law on directors remuneration, which we would readily subscribe to:

LAW ON DIRECTORS' REMUNERATION

[27] ... Directors of a company have no authority to expend on the funds of the company to pay themselves or any one of their number, unless they are authorised for such purpose by the company's constitution in its M & A or the payment is approved by the members of the company (see in Newman (George) & Co, Re[1895] 1 Ch 674). Bowen LJ in *Hutton v West Cork Railway Co* [1883] 23 Ch 654 stated as follows:

A director is not a servant (ie, employee). He is a person who is doing business for the company, but not upon ordinary terms. It is not implied from the mere fact that he is a director that he is to have right to be paid for it. In some companies ... there is a special provision for the way in which the directors should be paid; in others there is not. If there is a special provision for the way in which they are to be paid, you must look to the special provision to see how to deal with it. But if there is no special provision their payment is in the nature of a gratuity.

[28] *A director of a company therefore does not have a right to be remunerated as of right by virtue of his office except as provided by its constitution or approved by its shareholders*. In Re Richmond Gate Property Co Ltd [1964] 3 All ER 936, it was held that in the absence of any resolution concerning the amount of directors' remuneration passed pursuant to the articles in general meeting prior to the liquidation of the company, the directors were thus not entitled to any remuneration. In *Guinness PLC v Saunders* [1990] 2 AC 663, the articles provided that the remuneration of the director performing services for the

company outside the scope of the ordinary duties of a director was to be determined by the company's Board as a whole ...

[29] *Neither is the fact that a person is a director of a company in itself makes that person an employee, which would otherwise entitle him to remuneration as an employee.* (Emphasis added.)

[45] The case of *Ever-Yield Sdn Bhd* clearly shows that a director is not an employee. Directors' fees is only to be approved during the annual general meeting, which was clearly demonstrated in the present case by virtue of various AGM reports (see: Vol 2G of the record of appeal (encl 12) on pp 104–259).

[46] Thus, there are possibilities of occasions where the appellant won't even be remunerated — but this does not make the appellant any less of an independent director than he already is. As provided in the appellant's testimony, the appellant does not get paid monthly but only upon the approval during the annual general meeting (see: the notes of proceeding (encl 42) on p 90).

[47] On the other hand, the employee's salary is usually paid on a daily, weekly, daily or monthly basis and the amount will be known to the employee prior to the commencement of the employment. If the employee is not remunerated, an action can be pursued in the Industrial Court meanwhile the appellant does not have such rights.

[48] Based on the above, it is clear that the learned SCIT had erred in her understanding of the role, responsibilities and liabilities of an independent director such as the appellant and had misconstrued the tax treatment of the directors' fee received by the appellant.

Letters issued by the company secretary

[49] The company secretary of the companies in which the appellant sat as an independent director has produced various letters issued by the company secretary to show that the appellant was appointed as an independent director and is not an employee of the company. These letters further stated that the appellant was engaged for advice and services in exchange for a fee as approved by the shareholders at the AGM of the company.

[50] However, I find that the learned SCIT had disregarded these letters issued by the company secretary and held as follows:

[49] Surat-surat yang dikeluarkan dan ditandatangani oleh setiausaha syarikat-syarikat tersebut memaklumkan bahawa Perayu bukan pekerja/employee

mereka. Perayu mengatakan Responden melalui SR1 enggan menerima semua surat-surat tersebut kerana ia ditandatangani oleh setiausaha syarikat dan bukannya pengarah syarikat. Di dalam hal ini Penal menerima pengataan Responden dan berpandangan pelantikan Perayu tidak dilakukan oleh setiausaha syarikat, maka pengesahan tersebut perlu dilakukan oleh mereka yang diberi kuasa untuk melantik.

(See: the additional record of appeal (encl 18) on p 81, para 49 of the SCIT's grounds of decision.)

[51] Given the above, this court finds that the learned SCIT and the respondent had failed to understand the position and status of a company secretary and failed to appreciate the role and functions of a company secretary under the Companies Act 1965.

[52] This has been reflected in the evidence given by RW during the cross-examination when RW confirmed that if the letters were signed by the company's management as director instead of the company secretary, RW would then accept the content of the letter.

(See: the notes of proceeding (encl 42) on pp 48–51.)

[53] Clearly the evidence of RW shows that RW failed to appreciate that a company secretary is an officer of the company on which the appellant sat as an independent director. The learned SCIT's concurrence with this position is similarly erroneous.

[54] Section 216 of the Companies Act 2016 provides:

216 *Responsibility for actions of delegate*

(1) Except as is otherwise provided by this Act, the constitution or any resolution of the Board or members of the company, *the directors may delegate any power of the Board to any committee of the Board*, director, *officer*, employee, expert or any other person. (Emphasis added.)

[55] In *Tan Ban Uu & Anor v Ong Ghin Leong* [2017] MLJU 244; [2017] 1 MLRHU 115; [2017] 3 AMR 287 Collin Lawrence Sequerah J (now JCA) held as follows:

[46] *The company secretary has been described as one who ensures compliance with the regulations affecting the company. He keeps the necessary registers, sends out notices, organises meetings, takes down minutes and files whatever forms required by law*. His duties are not fixed by law but are assigned to him by the articles of association or his contract of employment. *He follows the instructions of the board of directors of the company*. His relationship with the company has also been described as contractual in nature. See *Company Law* by Walter Woon Second edition at p 219.

A [47] It is *therefore clear that his duties are primarily to the board of directors*. (Emphasis added.)

[56] Based on the above, I am of the considered opinion that the letters issued and signed by the company secretary should be treated as issued and signed by the board of directors. Therefore, the RW and the SCIT should not have disregarded the letters.

Issuance of EA Form

[57] In raising the notices of assessment against the appellant, the respondent had solely relied on the EA Forms received by the appellant from the public listed companies and concluded that the appellant is an employee.

[58] I am of the view that the SCIT had erred in concluding that the EA Form is prima facie evidence that the appellant is an employee. I view that the Form is merely an administrative form prepared by the IRB to obtain necessary information on taxpayers. The Form certainly does not supersede the laws enacted by Parliament. This has been stated by RW in his evidence.

[59] The following are verbatim statements made by RW:

> SKS: Line kedua, item 1, fee termasuk fee pangarah, commission atau bonus. Dan dalam kurungan bonus bagi tempoh dash. Taxpayer mengisi sana, director's fee, betul?
>
> NBI: Betul.
>
> SKS: LHDN dalam format dia telah pun mengatakan fee itu termasuk fee pengarah, betul? Format LHDN.
>
> NBI: Ya, betul.

(See: p 46 of the notes of proceeding (encl 42) (p 24 of 16 November 2021).)

[60] It was confirmed by the RW during the cross-examination that all the EA Forms issued by the public listed companies to the appellant for his service as an independent non-executive director are of the same format that was prepared by the respondent and the standard format includes director's fees.

(See: p 48 of the notes of proceeding (encl 42) (p 26 of 16 November 2021).)

[61] The RW had also conceded that it is mandatory for companies to issue an EA Form when RW said as follows:

> SKS: LHDN dalam format dia telah pun mengatakan fee itu termasuk fee pengarah, betul? Format LHDN.
>
> NBI: Ya, betul.

SKS: Encik Nashrol, form ini dikeluarkan oleh IJM Plantations Berhad, betul? Di hujung page.

NBI: Betul.

SKS: IJM Plantations Berhad bagi TT 2007?

NBI: Betul.

SKS: Kepada Datuk Oh Chong Peng, betul?

NBI: Ya.

SKS: Dan adalah wajib untuk IJM Plantations Berhad untuk mengeluarkan Borang ini, betul?

NBI: Betul.

SKS: Dan dalam borang ini pihak LHDN pun telah mengatakan bahawa gaji termasuk fee, sorry, fee termasuk fee pengarah harus dicatitkan, betul?

NBI: Betul.

SKS: Dan diberikan kepada penerimanya.

NBI: Betul.

SKS: Dan jika IJM Plantations Berhad tidak mengeluarkan Borang EA

ini, itu menjadi satu kesalahan.

NBI: Betul.

(See: pp 46–47 of the notes of proceedings in encl 42 (pp 24–25 of 16 November 2021).)

From the evidence produced before this court, I find the EA Form is a standard format prepared by the respondent which includes the director's fee, and this was agreed by the RW. It does not in any way become the determining factor in deciding the appellant's status and role in the company and does not determine the appellant's chargeability to tax (either under s 4(a) or 4(b) of the ITA).

[62] In fact, it is the companies that issue the EA Forms and this is not within the appellant's control. Clearly, the appellant by receiving an EA Form does not necessarily or automatically mean that he is an employee.

[63] Therefore, the respondent had erred to conclude that the appellant is an employee merely because the appellant had received EA Forms from the various listed companies where he sat as an independent director.

COMMONWEALTH JURISDICTION

[64] I find that case laws from other Commonwealth countries also take the position that an independent director is not an employee.

[65] The Indian Income Tax Appellate Tribunal in the case of *Kalyani Forge*

Ltd Pune v Assessee on 27 May 2015 expressly stated that the non-executive directors were not employees of the company.

[66] In *A & Anor v C & Anor* [2015] SASC 35, the Supreme Court of South Australia stated that a non-executive director is not an employee on the basis that the rights and duties of an independent director, arise under the general law. Hence, despite a non-executive does receive remuneration, he is still not considered as an employee of the company.

[67] In *Ace Insurance Ltd v Trifunovski* [2014] 2 ILJ 399, the Federal Court of Australia held that the respondent was not employed by the appellant even despite the existence of a contract. The court looked into the substance of the contract in lieu of a single or unifying test in determining the existence of an employment relationship.

[68] Therefore, based on the above, the SCIT should have looked into the substance of the appellant's job scope and responsibilities as an independent non-executive director. Had the SCIT done so, the SCIT would have noted the difference and concluded that the appellant is not an employee.

TIME BARRED ASSESSMENTS

[69] Pursuant to s 91(1) of the ITA, the respondent is only allowed to raise additional assessments within five years after the relevant year of assessment unless one of the exceptions in s 91(3) of the ITA exists, namely whether there is any fraud or the taxpayer has been negligent.

[70] The learned SCIT acknowledges that it is undisputed that the respondent had raised assessments outside the prescribed limit for the YAs from 2002 to 2009. However, the learned SCIT took the view that the respondent had successfully established negligence on the part of the appellant.

[71] Based on the facts established by the SCIT, I am of the view that there is an error made by the SCIT's finding that the appellant was negligent. This is because the respondent has failed to discharge the burden of proof in proving that the appellant was negligent.

[72] The respondent claimed that the appellant had negligently declared the director's fees and allowances received by him from the public listed companies in which he had sat on the Board of Directors as management companies' income.

[73] However, I find that the appellant as an independent non-executive director is not an employee and the income received by him cannot be treated

as employment income. Thus, there is no negligence found in the appellant's declaration of income. A

[74] More importantly, I find that the respondent had failed to prove negligence against the appellant as the appellant had done diligently what the law expects of a reasonable person in his position whereby: B

(a) the appellant took professional advice from a professional and independent tax firm;

(b) the appellant had provided full cooperation during the audit; C

(c) the appellant made full and frank disclosure of its tax treatment in relation to his two management companies;

(d) the appellant filed its tax returns within the prescribed statutory time frame; and D

(e) there was no attempt by the appellant to evade or avoid tax.

[75] The facts of the instant case are similar with the Court of Appeal case of *Infra Quest Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2016] MSTC 30–133, where the respondent had failed to prove negligence against the appellant as the appellant had done diligently what the law expects of a reasonable person: E

(a) the appellant took professional advice from a professional and independent tax firm; F

(b) the appellant had provided full cooperation during the audit;

(c) the appellant made full and frank disclosure of its tax treatment in relation to his two management companies;

(d) the appellant filed its tax returns within the prescribed statutory time frame; and G

(e) there was no attempt by the appellant to evade or avoid tax.

[76] Based on the above, I am of the considered view that the SCIT had failed to consider that the respondent had failed to produce any proof of negligence on the part of the appellant and did not provide any reason to justify the basis for raising the time-barred assessments. H

[77] I find that the only reason given by the respondent was that time-barred assessments were raised because the appellant should have been subjected to the tax under s 4(b) of the ITA. I

[78] This court is of the considered view that mere disagreements in the

reading of the taxing statute does not indicate fraud, wilful default or negligence.

[79] The appellant in the instant case had taken reasonable steps to file and pay taxes in compliance with the law. This can be seen from each of the appellant's tax returns where all were filed within the stipulated time frame. This was also acknowledged by the RW.

[80] The appellant did in fact report the receipt of the income, albeit under a different provision in the ITA. How could it be said that the appellant was negligent when the appellant did not fail to make the necessary declaration? The only issue in question is whether the correct provision is s 4(a) or 4(b) of the ITA. This is a question of interpretation of the law and does not indicate negligence.

PENALTY

[81] It is not disputed that the respondent has discretionary power to impose a penalty against the appellant under sub-s 113(2) of the ITA which reads as follows:

> Incorrect returns
>
> (1) Any person who —
>
> (a) Makes an incorrect return by omitting or understanding any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) Gives any incorrect information in relation to any matter affecting his own chargeability to tax of any other person,
>
> shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequences of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.
>
> (2) Where a person,
>
> (a) Makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) Gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,
>
> Then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, *the Director General may require that*

person to pay a penalty equal to the amount of tax which has been undercharged in consequences of the incorrect return or incorrect information or which would have been undercharged if the return or information has been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under subsection 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1). (Emphasis added.)

[82] Based on the above, it is clear that it is the discretion of the Director General of the respondent to impose penalties under sub-s 113(2) of the ITA after taking into consideration all relevant facts and circumstances of the case.

[83] However, after taking into consideration all the relevant facts and circumstances of the case, I view that the respondent had failed to exercise its discretion on the imposition of a penalty and did not provide reasons for the penalty. On the other hand, I find that the appellant had acted in good faith at all times, sought professional advice from a tax agent, was cooperative during the audit period and submitted his tax returns within the stipulated filing deadline throughout the years and the matter in dispute arose from a technical adjustment.

[84] Looking at the totality of the facts in this case, I am of the view that even if there was an incorrect return or information submitted by the appellant, it was done in good faith. Hence, I am of the view the imposition of penalty is wrong in law as there was no breach by the appellant.

CONCLUSION

[85] Based on the reasons given above, this court is of the considered view that:

(a) an independent non-executive director is not an employee therefore the director fees, allowances and consultancy fees should not be subject to tax under s 4(b) of the ITA as employment tax;

(b) the respondent has not successfully proven negligence on the part of the appellant therefore the burden of proof under s 91(3) of the ITA in relation to time-barred assessments has not been discharged; and

(c) the respondent has no legal or factual basis to impose a penalty against the appellant for the YAs 2002 to 2012 under s 113(2) of the ITA.

[86] The learned SCIT had failed to scrutinise the evidence presented before it and had misapplied the law and facts that merit the interference by this court.

[87] As such, I allow the appeal by the appellant (encl 1) with costs of RM2,000 subject to the allocator fee.

Appellant's appeal allowed with costs of RM2,000 subject to allocator fee.

Reported by Dzulqarnain Ab Fatar